

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN CHRISTOPHER ANDERSEN, } Case No. 3:10-00067-ECR-VPC
Plaintiff, }
vs. }
ORDER
JOHN W. HELZER, RANDY LeBLANC, }
MARSHAL EMERSON, ASST. U.S. }
ATTORNEY HOLLY VANCE, }
Defendants. }

16 On April 19, 2010, Defendants filed a motion to dismiss (# 12) pursuant to
17 Fed. R. Civ. P. 12(b)(6). Plaintiff has responded (#14) to the motion and
18 Defendants have filed a reply (#15) in support of the motion. On December 27,
19 2010, Plaintiff filed an amended complaint (#21) which states the same
20 allegations as the original complaint filed on March 11, 2010. On January 27,
21 2011, Defendants filed a motion to dismiss (#22) which in essence states the
22 same defenses under Fed.R.Civ.P. 12(b)(6) as their earlier motion to dismiss
23 (#12). Since the complaint and motion to dismiss are materially the same, we
24 shall address the fully briefed motion to dismiss.

COUNT I

27 Count I is pled only against Defendant Helzer. It alleges that in violation
28 of the Fourth Amendment, Defendant Helzer tapped Plaintiff's home telephone.

1 On its face, the allegations in Count I barely state a valid constitutional
2 claim. The allegations involve primarily circumstantial evidence. There may
3 have been no wiretap at all. However, reasonable inferences from the pleading
4 are sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

5 Defendant Helzer's defense as stated in the motion is that 18 U.S.C. §
6 2520 preempts actions brought as 42 U.S.C. § 1983 constitutional claims; and
7 that therefore the present action should be dismissed under F.R.Civ.P. 12(b)(6).
8 Title 18 U.S.C. § 2520 provides that a person may bring a private civil action if
9 his telephone conversations are unlawfully intercepted. The statute § 2520 does
10 appear to provide a statutory means of redress which in a number of ways
11 overlaps an action brought for a constitutionally unlawful search under the
12 Fourth Amendment.

13 18 U.S.C. § 2520 provides that a person whose wire communication is
14 intercepted in violation of this chapter (18 U.S.C. § 2510, *et seq.*) may bring a
15 civil action to recover from the person which engaged in the violation relief as
16 may be appropriate. The relief available under this statute appears to include all
17 of the types of relief that a party may obtain in a § 1983 Civil Rights Action and
18 additional statutory damages.

19 In some circumstances, a statutory remedy may replace a remedy under
20 § 1983 for violation of a constitutional right. The test may be whether the
21 constitutional right is broader than the statutory right.

22 The portion of the chapter 18 U.S.C. § 2510 to 2519 provides in general
23 for:

24 § 2510: Definitions;
25 § 2511: Criminal penalties for unlawful wire interceptions
26 where no appropriate warrant has been obtained;
27 § 2512: Manufacture, distribution or possession of devices for
28 surreptitious interception prohibited by statute;

In Count I, Plaintiff seeks recovery under § 1983 for violation of his constitutional rights through an unlawful wiretap. He does not seek recovery for violation of the federal wiretap statute §§ 2510-22 (18 U.S.C. §§ 2510-22). The fact that Plaintiff does not seek relief for violation under the wiretap statute but rather seeks relief for violation of his constitutional rights is a consideration in our decision.

Rights under the statute § 2520 are significantly broader than pure constitutional rights under the Fourth Amendment which Plaintiff asserts in this case. Section 2520 allows a plaintiff to seek relief not only for the intrusion, but also for disclosure of unlawfully intercepted communications. However, here Plaintiff seeks only relief for the intrusion. It is also true that municipalities may be liable for unlawful wiretaps under § 1983, but not § 2520. Again, this does

1 not make any difference in the case at bar, which is brought against an individual
2 not against a municipality.

3 The conduct alleged in the case at bar is the same whether the action is
4 brought under § 1983 as a constitutional claim or as a violation of the statute
5 under § 2520. The remedies of declaratory judgment, injunction, and damages
6 appear to be generally the same whichever statute is applied. Section 2520 is not
7 as comprehensive as some other comparable statutes that do preempt § 1983
8 claims in that it does contain, for example, provisions for exhaustion, mediation,
9 or administrative conciliation. Cf. Title VII.

10 The case of Amati, et al. v. The City of Woodstock, et al., 829 F.Supp. 998
11 (N.D. Ill. 1993) discussing U.S.v. Dorfman, 690 F.2d 1217 (7th Cir. 1982) argues
12 that the wiretap statute § 2520 does not preempt § 1983 claims; that at least in a
13 considerable number of respects § 2520 is not coextensive with § 1983 claims
14 made under the Fourth Amendment. Amati points out that the difference in
15 municipal liability mentioned above is the general presumption against
16 Congressional repeals of prior statutes by implication. The case of Waldon v.
17 City of Providence, 495 F.Supp.2d 245 (D.R.I. 2007) presents an analysis which
18 fairly closely tracks Amati. Congressional intent in enacting § 2520 is an
19 important aspect of the analysis.

20 It appears that in § 2520 Congress did intend to provide special safeguards
21 against unique problems posed by misuse of wiretaps. Section 2520 also
22 includes extensive remedies in the privacy area which do not follow from the
23 pure constitutional claim. The fact that the statute is in some respects broader
24 than the prior constitutional claim may argue for preemption. However, in this
25 case, the differences, i.e., the broader rights under the statute don't really make
26 any difference in light of the claim of Plaintiff in Count I. Nonetheless, we
27 conclude that this should not be determinative, but only part of the mix.
28

1 On the other side of the fence is Adams v. Battle Creek, 250 F.3d 980 (6th
2 Cir. 2001) which generally goes in the other direction in favor of preemption.
3 The Sixth Circuit would find § 2520 provides the exclusive remedy for Plaintiff.
4 The Sixth Circuit jurisprudence appears to conclude that Plaintiff could only
5 bring his action under § 2520 and that the motion should be granted.

The statute § 2520 and rights under § 1983 are not totally coextensive as noted above, including any other things that there is no municipal liability under the statute. There are some significant differences, even though the differences don't appear to make a difference in this case. In the final analysis, it does not appear that Congress intended to make § 2520 the exclusive remedy for an unlawful wiretap and to preempt possible claims under § 1983.

In the long run, it does not make much difference whether the action is brought under § 1983 or § 2520. If we were to grant the motion, we would likely allow Plaintiff to file an amended complaint under § 2520. On the face of it, it appears Plaintiff may be able to plead such an action in an amended complaint.

16 There isn't, at this early stage of the proceedings, any particularly
17 convincing reason to require the case to be dismissed and re-pled under § 2520 if
18 that were appropriate. It all appears to come out about the same. Should
19 Plaintiff in the future seek to allege broader claims or remedies encompassed in §
20 2520, but not cognizable under § 1983, then it is likely such claims would have
21 to be pled under § 2520.

Leaving the case in its present posture seems the best course for now.

COUNTS II AND III

Counts II and III of the Complaint are pled against Defendants LeBlanc and Emerson. Defendant Helzer is not mentioned in either Count II or III. The crux of the claims in these counts is that LeBlanc and Emerson refused to investigate and prosecute Jim Wagoner, an individual Plaintiff accused of

1 stealing his truck and tools and failing to return \$700 paid to Wagoner to repair
2 the truck.

3 The Complaint is filed as a civil rights action pursuant to 42 U.S.C.
4 § 1983. To succeed on such a claim in this case, Plaintiff must plead and show
5 that the actions of the state employees, LeBlanc and Emerson, deprived Plaintiff
6 of a constitutional right.

7 There simply is no constitutional right to have another person investigated
8 or prosecuted for a crime. Whether such right is claimed to be a liberty or
9 property right, there is no such right. Even if such conduct as a result destroyed
10 Plaintiff's livelihood, the conduct of failing to investigate or prosecute did not
11 deprive Plaintiff of a constitutional right for which he is entitled to relief.

12 The failure of public officials to investigate or prosecute crime is a matter
13 for public opinion, policy, and the ballot box.

Plaintiff has stated his factual allegations in detail in the Complaint and his opposition to Defendants' motion to dismiss. It does not appear that there are any remaining additional facts which Plaintiff might allege to support Counts II and III. It will therefore be ordered that the motion (#22) will be GRANTED as to all Defendants without leave to amend.

MOTION TO STRIKE

21 Defendants move to strike (#15) Plaintiff's opposition (#14) to the Motion
22 to Dismiss (#12) for failure to sign it. Upon learning of this objection by
23 Defendants, Plaintiff filed a letter (#16) indicating that if offered the opportunity
24 to do so, he would sign the opposition. We view this as a sufficient indication
25 that Plaintiff subscribes to everything stated in his opposition to the motion. It
26 appears to have been an oversight that Plaintiff failed to sign the opposition. The
27 opposition to the motion (#14) will be received by the Court as an opposition to
28 Defendants' Motion to Dismiss (#12). The motion to strike (#15) in this respect

1 will be denied.

2 Defendants also move (#15) to strike miscellaneous documents which are
3 attached to Plaintiff's opposition (#14) to the Motion to Dismiss (#12). Plaintiff
4 attached to the opposition (#14) various miscellaneous documents including:

- 5 (1) Letters exchanged between Plaintiff and Defendant Helzer;
6 (2) A bill for towing and storage of Plaintiff's truck;
7 (3) Instructions and return for service of process on Defendants;
8 (4) A statement by Plaintiff to the Washoe County Sheriff's Office;
9 (5) An auto body repair order to Wagoners Auto Repair with respect to
10 Plaintiff's truck;
11 (6) A written statement from small claims court;
12 (7) A written statement by Plaintiff's daughter, Shannon L. Dohr-
13 Andersen.

14 The issue now before the Court is whether Plaintiff's Complaint states a
15 cause or causes of action against Defendants. It is not at this stage a matter of
16 whether there is evidence to prove the allegations of the Plaintiff's Complaint. In
17 ruling on the present motion, the Court may take judicial notice of documents
18 which are not subject to reasonable dispute in that they are generally known
19 within the territorial jurisdiction of the trial court or capable of accurate and
20 ready determination by resort to sources whose accuracy cannot be reasonably
21 questioned. Only a portion of the documents listed in paragraph (3) above and
22 the documents listed in paragraph (6) above would under these requirements
23 possibly be judicially noticed and they are not relevant to the issues now before
24 the Court, which is pleading wording and reasonable inferences from the
25 wording of the Complaint as it stands. The motion to strike (#15) will therefore
26 be GRANTED as to the documents attached to the opposition (#14) listed in
27 paragraphs (1) through (7) above.

28 We have addressed the issues raised in Defendants' motion to strike, in

1 light of the Amended Complaint (#21) and Defendants' renewed motion to
2 dismiss (#22). The motion to strike will be denied.

ORDER

5 THEREFORE, IT IS HEREBY ORDERED that Defendants' Motion to
6 Dismiss (#12 and # 22), pursuant to Fed. R. Civ. P. 12(b)(6) is DENIED as to
7 Count I and is GRANTED as to Counts II and III with prejudice.

8 IT IS FURTHER ORDERED that Defendants' motion to strike (#15) is
9 GRANTED as to the documents listed above in paragraphs (1) through (7) in
10 respect to that portion of this Order relating to Counts II and III which are
11 attached to Plaintiff's opposition (#14).

12 IT IS FURTHER ORDERED that Defendants' motion to strike (#15) is
13 DENIED with respect to striking Plaintiff's opposition (#14).

15 Dated this 19th day of September 2011.

Edward C. Reed.
EDWARD C. REED, JR.
United States District Judge